IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 622 OF 2005

Reshma Trust & ors. ... Petitioners

V/s

Jude Gonsalves & anr. ... Respondents

Mr. G.S. Hegde with R.R. Kulekar for the petitioners.

Mr. Clive D'Souza for the respondent No.1.

CORAM: P.V. KAKADE, J.

DATED: 21ST MARCH, 2006

P.C.:

1. Heard learned counsel for both parties. Perused the record.

2. This petition is aimed against the judgment and order passed by the lower appellate Court dated 26.10.2004 allowing the appeal and setting aside the Trial Court order passed in R.A.D. Suit No. 6807 of 1980 dismissing the suit on the issue of jurisdiction and holding that the Trial Court had jurisdiction to entertain the suit and therefore proceed with the suit according to law.

3. The plaintiffs respondent filed the suit for declaration to the effect that the agreement dated 4.5.1980 be declared as illegal and the petitioner be declared as lawful tenant in respect of the suit premises consisting of two rooms. The suit was also for perpetual injunction as a consequential relief.

The plaintiffs claim themselves to be the tenant in respect of the suit premises and the said tenancy was allegedly created by father of plaintiff No.1. According to the plaintiff, he was residing in the suit premises since 1970 on monthly rent of Rs.50/- plus other charges. The original defendant No.1 who died during the pendency of the suit, sold the entire plot of land with entire structure to defendant No.2 by virtue of an agreement dated 23.12.1971 for the purpose of constructing a multi-storeyed building. The plaintiffs therefore claim tenancy right in the suit premises as the tenant of two original tenants i.e. the father of plaintiff No.1 and the said agreement was signed by defendant No.2. The tenancy of the plaintiffs has been denied by the landlord and, therefore, cause of action arose by filing of the suit.

4. The defendants contested the claim submitting that originally the father of the plaintiff No.1 i.e. defendant No.1 was the owner of the suit structure and the said plot was sold to defendants and defendant No.1 was owner of the same. The transaction was executed between the parties for the purpose of construction of the building over the said plot. In other words, the alleged tenancy created was denied by the defendants.

5. The learned Trial Judge, after hearing both parties on merits, raised a preliminary issue regarding jurisdiction of the Court to entertain and try the suit in view of denial of relationship in between the parties i.e. landlord and tenant.

6. After hearing both parties, the Trial Court Judge came to the conclusion that the Trial Court had no jurisdiction to entertain and try the suit and by order dated 15.2.2000 dismissed the suit itself.

7. The appeal was preferred before the lower appellate Court, who, after hearing both parties were of the view that the lower Trial Court erred in holding that it had no jurisdiction to try and entertain the suit and, as such, set aside that order and restored the suit with

direction to proceed according to law. Hence the present petition.

8. At the outset, it may be noted that it is clear from the record that the plaintiffs are claiming tenancy rights from defendant No.1. The substance of the plaint is that plaintiff No.1 is in occupation of premises since the year 1970 on monthly rent of Rs.50/-. Defendant No.1 - original landlord sold the property to defendant No.2. Defendant Nos. 2, 3 & 4 attended the sale of the property but they denied that plaintiff No.1 was the tenant of deceased defendant No.1. The lower appellate Court relied upon the judgment of the Supreme Court in the case of Abdulla Buin Ali & ors. v/s Galappa and ors., reported in A.I.R. 1985 SC 577, wherein it was held that while determining the issue of jurisdiction, the allegations made in the plaint decide the forum. The jurisdiction does not depend upon the defence taken by the defendants in the written statement. On the basis of this aspect, the lower appellate Court was of the view that in the present case, the Trial Court had not framed preliminary issue under Order 14 Rule 2 of the C.P.C. but the issue was raised in view of the affidavit in reply in notice. The notice was 9-A of the C.P.C. in injunction notice and

defendant was given opportunity to lead the evidence. On this back ground, the lower appellate Court was of the view that merely defence raised by the defendant does not oust the jurisdiction of the Court and plaintiff may succeed or fail on the basis of evidence at the time of final hearing.

9. On perusal of the reasoning adopted by the lower appellate Court, I am of the view that the lower appellate Court has rightly held that the suit cannot be dismissed by the Trial Court only on the issue of jurisdiction which was raised on the basis of written statement filed by the defendant when the preliminary issue was not raised under Order 14 Rule 2 of the C.P.C. In other words, I hold that the question whether the relationship existed of the landlord and tenant between the parties could be decided on merits after hearing both parties and giving them opportunity to lead evidence at the time of final adjudication of the matter.

10. In the result, I concur with the finding recorded by the lower appellate court and consequently dismiss the petition.

Petition stands dismissed with no order as to costs..

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